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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 54

UNITED STATES OF AMERICA *ex rel.* ELLEN KNAUFF,

Appellant,

vs.

EDWARD J. SHAUGHNESSY, Acting District Director of Immigration and Naturalization Service,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

JACK WASSERMAN,
WILLIAM B. GUROCK,
of Counsel.

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

Interest of American Civil Liberties Union

This brief *amicus curiae* is submitted with consent of the parties hereto. One of the prime objectives of the American Civil Liberties Union is that no person shall be deprived of life, liberty, or property without due process of law. It believes that the case at bar involves a highly significant instance of deprivation of liberty without due process of law.

Statement

The appellant applied on August 14, 1948, at the Port of New York for admission to the United States under the special benefits of the War Brides Act (Ch. 591,

Public Law 271 of 1945). She was taken that day to Ellis Island where she was temporarily excluded from the United States. Thereafter, on October 6, 1948, the Attorney General ordered the appellant finally excluded from the United States. At no time was the appellant granted a hearing before a Board of Special Inquiry, nor was she ever advised of the reasons for such exclusion.

ARGUMENT

I

The denial of an administrative hearing was in violation of law and of the Constitution.

Under the due process clause of the Fifth Amendment and as a matter of statutory construction, appellant is entitled to a hearing to determine her admissibility to the United States.

Aliens arriving in the United States have been granted hearings to determine their admissibility for at least the last fifty years. The basic immigration statute of February 5, 1917, provides for a hearing before a Board of Special Inquiry (8 U.S.C. 152). Hearings are similarly granted under the Anarchist Act of 1918 (8 U.S.C. 137), the Quota Act of 1924 (8 U.S.C. 201), the Alien Registration Act of 1940 (8 U.S.C. 451) and the act excluding aliens believed by the Attorney General to be entering to engage in activities endangering the public safety (Public Law 552 of 1948).

These hearings are not merely the result of legislative decree but are required by the Constitution. This principle was clearly established in cases arising prior and subsequent to the enactment of statutes providing for

hearings. The *Japanese Immigrant* case, 189 U. S. 86 (*Kaoru Yamataya* v. *Fisher*), 47 Law Ed. 721, 1903, established the principle that an alien under deportation proceedings was entitled to a fair administrative hearing. The Court in this case states:

> "But this Court has never held, nor must be now understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends."

In *Chin Yow* v. *United States*, 208 U. S. 8 (1908), this doctrine was extended to persons excluded from admission to the United States. While in the *Chin Yow* case the issue was one of citizenship, yet the report entitled "The Secretary of Labor's Committee on Administrative Procedure, The Immiigration and Naturalization Service" by Marshall E. Dimock, Henry M. Hart and John McIntire (1940) notes that the *Chin Yow* case is not confined to citizenship claims but also to any applicant for admission to the United States. See also *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335-336 (1932). Since the time of the *Lloyd Sabaudo* case the courts have consistently taken the view that an alien applying for admission to the United States is entitled to a fair administrative hearing. In *United States ex rel. Brandt* v. *District Director of Immigration*, 40 Fed. Supp. 371 (D.C.N.Y. 1941) an alien arriving entirely without documents was said to be con-

stitutionally entitled to a hearing on the question of whether he came within a category of emergency cases which the Secretary of State was authorized to define. Similarly, in *Johnson* v. *Tertzag*, 2 F. (2d) 40 (D. C. Mass., 1924), the court left no doubt as to its view of the administrative power exercised in exclusion cases. With respect to this power the court, quoting from *Ewock Jan Fat* v. *White*, 253 U. S. 454 at 464, stated:

> "It is a power to be administered, not arbitrarily or secretly, but fairly and openly under the restraints and principles of free government applicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the courts, in proceedings for review * * * to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment."

In *Ex parte Petkos*, 212 Fed. 275, 278 (D. C. Mass. 1913, reversed on other grounds, 214 Fed. 978) the Court, after indicating its views as to the constitutional requirement for a fair hearing, held that there had not been such a hearing because he had never been apprised of the evidence upon which he was to be deported and had no opportunity to meet it. Compare *United States ex rel. Reimann* v. *Martin*, 193 Fed. 795; *Gung You* v. *Nagle*, 34 F. (2d) 848; *Tod* v. *Waldman*, 266 U. S. 113; *O'Connell ex rel. Foo* v. *Ward*, 126 F. (2d) 615.

The Immigration and Naturalization Service publication, *Monthly Review*, in an article in the January 1945 issue by Commissioner Ugo Carusi, states at page 101 that: "An alien seeking to enter the United States is entitled to a fair hearing. * * *" See also Note, 13 Columbia Law Review 1013.

The Passport Act of May 22, 1918 (40 Stat. 559) until November 14, 1941 was consistently interpreted administratively as authorizing the imposition of additional documentary conditions upon the entry of aliens, but such aliens were always accorded hearings as a matter or right under the Immigration Act of February 5, 1917 (8 U.S.C. 152).

The amendment of June 21, 1941 (55 Stat. 252) of the Passport Act of 1918, authorized the President to impose additional conditions on the entry and departure of aliens whenever there was a state of war between two foreign states, a national emergency, or during wartime (22 U.S.C. 223-226).

Pursuant to this amendment Presidential Proclamation No. 2523, issued November 14, 1941, based on the existence of a national emergency and a state of war between two foreign states, authorized denial of entry to aliens where it appeared to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States, as provided in rules and regulations authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General. By 8 C.F.R. 175.53 the classes of aliens whose entry was deemed prejudicial was defined. Section 175.57 of these regulations authorizes the temporary exclusion of aliens by the Department of Justice and provides that an alien "shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other officials shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that

the admission of the alien would not be prejudicial to the interests of the United States."

However, paragraph (b) of this section of the regulations provides that no hearing by a Board of Special Inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. It is further provided that in any special case a hearing may be denied where the Attorney General determines that it is on the basis of "information of a confidential nature, the disclosure of which would be prejudicial to the public interest".

The 1941 amendment to the Passport Act made no material change. It authorized the President upon a proclamation finding that it was necessary to impose restrictions and prohibitions in *addition* to those otherwise provided to make it unlawful for an alien to enter "except under such reasonable rules, regulations, and orders and subject to such limitations and exceptions as the President shall prescribe."

Presidential Proclamation No. 2523 was issued on the basis of the National Emergency proclaimed on May 27, 1941. It requires aliens to present passports and excludes aliens whose entry the Secretary of State finds prejudicial.

It will be observed that no provision is made in the statute or the proclamation for the suspension of hearings heretofore granted for over twenty years under the statute to arriving aliens. In the light of the history of the statute, and the administrative practice thereunder, *in the absence of explicit language, there should be a strong presumption that Congress did not intend to authorize the denial of a hearing to an arriving alien. Congress did not explicitly authorize the President to deny a hearing*

nor did the Presidential Proclamation contain any such explicit authorization.

The authorization to deny a hearing is contained in 8 C.F.R. 175.57b. It is submitted that the regulations exceed the authority delegated by the statute and the proclamation.

Instead of imposing *additional* conditions on entering aliens, the regulations do two things: First, they exclude those already excludable under existing law as in the case of Communists and those who would endanger public safety; secondly, they eliminate hearings under 8 C.F.R. 175.57. If the statute and proclamation authorize the suspension of hearings, then the Secretary of State is authorized to nullify or abrogate all our immigration laws. Nowhere is there any intimation that Congress intended to grant such untrammelled authority. Exclusion hearings are granted when a subversive is denied entry under the Act of October 16, 1918 (8 U.S.C. 137). But where he is suspected of subversion and denied entry under the regulation which incorporates the same statute (8 C.F.R. 175.53) he may be denied a hearing under 8 C.F.R. 175.57(b) on the ground that *ex parte* information against him is confidential.

As recently as April 12, 1948, the United States Court of Appeals for the District of Columbia in the case of *Wilson v. Federal Communications Commission*, 170 F. 2(d) 793, 802, cited the *Japanese Immigration* case, *supra*, as authority for determining that a hearing was constitutionally required under a section of the Federal Communications Act which did not specifically provide for a hearing.

It is submitted that the regulations eliminating hearings in the light of a long history affording hearings should not be tolerated in the absence of express statutory authority. (The *Japanese Immigrant* case, *supra; Wilson*

v. *Federal Communications Commission, supra.*) It is apparent from these cases and numerous others to the same effect that the construction placed upon the statute and the proclamation is one which the courts hold improper on the ground that if so construed the statute would be unconstitutional.

It is a fact that the emergency proclaimed by President Roosevelt on May 27, 1941 is not in existence today nor are two states at war with each other as was true on November 14, 1941. We therefore question whether the Proclamation of November 14, 1941 is still in force. In any event the emergency upon which it was based can confer no power to perform acts otherwise unconstitutional. See *Home Bldg. & Loan Asso.* v. *Blaisdell*, 290 U. S. 398, 426. Denial of hearings is not in conformity with the statute and proclamation and is unconstitutional as shown above. The "emergency" cannot authorize such denial. The war power might permit such denial if properly invoked. But war between nations other than the United States does not give basis for invocation of that power. The substantially unlimited scope given to governmental authorities under the war power is itself the strongest possible reason for exercising extreme caution in finding that that power has been invoked. Thus the doctrine of *Korematsu* v. *United States*, 323 U. S. 214, and *Hirabayashi* v. *United States*, 335 U. S. 160, that American citizens may be subjected to unequal treatment affecting their liberties upon the basis of race or ancestry (see: Dembitz, *Racial Discrimination and the Military Judgment*, 40 Columbia L. Rev. 175) is in itself sufficiently shocking so that the power permitting such action must obviously be limited to cases in which it is explicitly invoked and warranted by statute and proclamation. Such is not the case here.

II

The statute herein is void for undue delegation of legislative power to the executive and for vagueness.

The statute authorizes the President to prescribe additional conditions on the entry and departure of aliens (22 U.S.C. 223-226). It does not define a class of inadmissible aliens. By proclamation the President banned the entry of aliens where it appeared to the Secretary of State that such entry would be "prejudicial to the interests of the United States". The Proclamation itself does not define or delimit the category of aliens whose entry would be prejudicial.

A similar statute was suggested in the 75th Congress in 1937. S. 1363 was a bill introduced by Senator Reynolds to deny visas to any alien whose presence in the United States was deemed inimical to the public interest, and to refer such cases to the President. Gerard Reilly, Acting Solicitor of Labor, opposed the bill with this comment:

> "Because of its vagueness as to the group of aliens sought to be denied visas, it would be difficult for the Secretary of State to determine which classes should be brought to the attention of the President. If the Congress intends to exclude additional classes from admission to the United States, those classes should be set forth in the law with definiteness."

A similar comment was made with reference to S. 1366 in the 75th Congress, 1st Session, by Frances Perkins, Secretary of Labor. See *Hearing before Senate Subcommittee on Deportation of Aliens*, April, 1937, at page 13. In the 76th Congress, 1st Session, S. 411 was introduced by Senator Reynolds. This is a bill to provide for the

deportation of aliens inimical to the public interest. Frances Perkins, Secretary of Labor, and Edward Shaughnessy, Deputy Commissioner of Immigration, both opposed this bill on the ground that its provisions were so vague as to make responsible administration of it impracticable. The Secretary of Labor stated:

> "Existing provisions of law have brought about the deportation each year of an average of 3,500 criminals, narcotic violators, immoral persons, mentally or physically defective aliens, anarchists, and kindred classes, whose presence in the United States is considered as not being in the best interests of the country. I suppose that this bill by referring to aliens 'inimical to the public interest' refers to aliens not within that group. I also presume that the Secretary of Labor, on whose warrant such aliens are to be deported, must determine in what cases an alien's presence is to be regarded as inimical to the public interest. The bill fails to define the terms 'inimical' or 'public interest' so that it is altogether indefinite as to what is to be regarded as the public interest or under what circumstances an alien's presence is to be regarded as inimical thereto. On the whole, I think the provision is so vague as to make responsible administration of it impracticable."
>
> See *Hearings on Deportation of Aliens*, 76th Congress, 1st Session (March, 1939), at pages 12 and 26.

The instant statute falls within the proscription set forth in the above communication on S. 1363, S. 1366 and S. 411 as well as within the proscription of *Schecter Poultry Corp.* v. *U. S.*, 295 U/S. 495 at 529, and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. In the *Schecter* case, *supra*, it was stated:

> "Instead of prescribing rules of conduct, it (the statute) authorizes the making of codes to prescribe them. For that legislative undertaking section 3 sets up no standards. * * * We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

The instant statute merely authorized the imposition of additional conditions upon entry. No standards were set, nor were the functions of the President delineated in any way. If S. 1363, S. 1366 and S. 411 were vague, and responsible administration of the same impracticable, the Act of June 21, 1941, attacked herein, presents an *a fortiori* case. In the instant case, one has to look beyond the statute to the Presidential Proclamation to find any standards whatever and even the standard there found conveys no suggestion as to the limits or the manner of its exercise. It therefore seems clear that the instant statute falls within the unconstitutional proscription noted above.

CONCLUSION

It is respectfully submitted that a denial of a hearing deprives the appellant of due process of law and the decision of the Court of Appeals for the Second Circuit should be reversed and the appellee directed to grant appellant a hearing before a Board of Special Inquiry.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
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